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MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

NO. 73-1563

RANDALL RAY GRANT,
Petitioner

V.

THE STATE OF TEXAS,
Respondent

On Petition for Writ of Certiorari to
The Court of Criminal Appeals of Texas

RESPONDENT'S BRIEF IN OPPOSITION

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OPINION BELOW

Petitioner seeks to review the opinion of the Court of Criminal Appeals of Texas, the opinion being reported at 505 SW2d 279.

JURISDICTION

The formal jurisdictional requisites of the Petition including its timely filing would appear to be satisfied,

although Respondent disputes Petitioner's contentions that any rights guaranteed by the Constitution of the United States have been denied.

QUESTION PRESENTED

Whether any constitutional requirement is violated where driving while intoxicated and driving under the influence of drugs are defined as separate crimes by the State of Texas with different penalties prescribed?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner asserts that the equal protection clause of the Fourteenth Amendment to the United States Constitution is involved:

Questioned are the validity of Texas' driving while intoxicated statute, Article 802, Texas Penal Code, and Texas' driving under the influence of narcotics, Article 6701d, Sec. 50(a)(b), Vernon's Texas Civil Statutes.

STATEMENT OF THE CASE

Petitioner was convicted of driving while intoxicated and assessed as punishment, a fine of $150.00 and ten days in jail with the jail sentence being probated.

The judgment of conviction was affirmed by the Court of Criminal Appeals of Texas on February 6, 1974, the

Court denying rehearing on February 27, 1974. This Petition, seeking review, followed:

As noted in the Petition, Texas has created separate crimes with different penalties for driving while intoxicated and driving under the influence of drugs. Petitioner argues that treating drivers, who use debilitating substances (Petitioner classifies both alcohol and drugs as "debilitating substances"), differently, violates the equal protection clause of the Fourteenth Amendment to the United States Constitution.

ARGUMENT AND AUTHORITIES

The Wisdom of the Texas Legislature in Treating Driving While Intoxicated and Driving Under the Influence of Drugs as Separate Crimes With Separate Penalties Should Not Be Questioned By the Courts

Perhaps, the most firmly established principle in the constitutional law is the rule that the wisdom, necessity and motivation of a legislature in enacting laws will not be subject to judicial scrutiny and review.

The rule (or rules) is stated in American Jurisprudence (16 Am. Jur., pages 374 through 384, the Article on Constitutional Law) as follows:

> "The wisdom of legislation is not a factor which is relevant to its constitutionality and thus is not a

matter which the courts will consider when legislation is under constitutional attack. . . .

"It is a mandate often repeated in the decisions of the courts that the expediency of legislation is not a matter for judicial concern and that inexpediency does not warrant invalidation on constitutional grounds. In judging the constitutionality of a particular statutory provision, it is not for the court to determine whether the provision comports well or ill with the purposes of the statute of which it is a part. . . .

"Propriety of legislation is not a factor going to its constitutional validity. And a statute or ordinance which is unnecessary is not for that reason unconstitutional; indeed, in determining the constitutional validity of legislation, the courts are unconcerned with issues as to the necessity for the enactment of the legislation in question. . . .

"One of the doctrines definitely established in the law is that if a statute appears on its face to be constitutional and valid, the court cannot inquire into the motives of the legislatures."

As noted, Texas has seen fit to separate the problem of the drunk driver and the doped driver by creating two offenses. Petitioner claims that the drunk driver is treated more harshly than the drug influenced motor vehicle operator and thus an equal protection problem is generated.

Interestingly, the federal government treats alcohol and narcotic drugs as different entities. 21 U.S.C. § 802 specifically excludes "distilled spirits, wine, malt be-

verages . . ." from the "drug(s)" dealt with in the federal drug abuse statutes. 28 U.S.C. §§ 801-966.

But whether or not the United States or Texas have clearly recognizable reasons for treating drugs and alcohol separately, the respective wisdoms of Congress and the Texas Legislature in separating the substances legislatively should not be refereed by the Courts. Proper notice is given to citizens subject to the federal and state statutes that the involved governments do consider alcohol and drugs as different substances creating different social problems. And in Texas, a person subject to the Texas Penal Code is given definite and precise information as to the consequences of drunk driving and of driving under the influence of drugs.

In *McCray v. United States,* 195 U.S. 27 (1907), the act of Congress in placing a prohibitive tax on artifically colored margarine was considered by this Court. It was argued that Congress had arbitrarily disciminated against oleomargarine in favor of butter for the benefit of the butter industry, a rather obvious equal protection situation. This Court stated on pages 53, 54 and 55:

> "Whilst, as a result of our written constitution, it is axiomatic that the judicial department of the goverment is charged with the solemn duty of enforcing the Constitution, and therefore in cases properly presented, of determining whether a given manifestation of authority has exceeded the power conferred by that instrument, *no instance is afforded from the foundation of the government where an act, which was within a power conferred, was*

> *declared to be repugnant to the Constitution, because it appeared to the judicial mind that the particular exertion of constitutional power was either unwise or unjust.* To announce such a principle would amount to declaring that in our constitutional system the judiciary was not only charged with the duty of upholding the Constitution but also with the responsibility of correcting every possible abuse arising from the exercise by the other departments of their conceded authority. So to hold would be to overturn the entire distinction between legislative, judicial and executive departments of the government, upon which our system is founded, and would be a mere act of judicial usurpation."

Without conceding that the Texas scheme of placing drunk and dope-influenced drivers in different classes so as to make operable the equal protection clause (Texas would say the drunk driver and the doped driver are separate problems and properly constitute separate crimes), arguendo, even if different classes are created, no constitutional imperfection is perceivable. As this Court said in *McGowan v. Maryland,* 366 U.S. 420, 425-426 (1961):

> "State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if *any state of facts reasonably may be conceived* to justify it." (Emphasis supplied).

And here, it is reasonably conceivable that the drunken driver constitutes a greater traffic menace than the drug-influenced driver because of the greater preval-

ence of drunk driving. See also *Ferguson v. Skrupa*, 372 U.S. 726 (1963), and *Marshall v. United States*, __ U.S. __, 93 S. Ct. 700 (1974).

Given the power to control drivers who use alcohol and drugs to excess, the legislative wisdom of Texas, in treating the alcohol user differently from the drug user, offends no constitutional injunction and this legislative decision should not be re-examined by this, or any, Court.

CONCLUSION

For the reasons set out above, Respondent respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, LONNY F. ZWIENER, Assistant Attorney General of Texas, certify that a copy of the foregoing Respondent's Brief in Opposition was served on Petitioner by placing same in the United States Mail, postage prepaid, on this the day of May, 1974, to Petitioner's attorney, Mr. Allen Glenn, Glenn & Thomas, Lawyers, P. O. Box 1316, Abilene, Texas 79604.

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